UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al, Debtors. — CAUSE NO. 08-13555(JMP)

- x

In re

LEHMAN BROTHERS, INC., Debtor. — CAUSE NO. 08-01420(JMP)(SIPA)

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

July 17, 2013

10:12 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

ECRO: F. FERGUSON

HEARING Re Motion of Lehman Brothers Holdings, Inc., Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 7004(a)(1), to Extend Stay of Avoidance Actions and Grant Certain Related Relief (ECF No. 38118)

HEARING Re Motion pursuant to Federal Rule of Bankruptcy Procedure 9019 for Entry of Order Approving Settlement Agreement Between the Trustee and Lehman Brothers Securities N.V. (LBI ECF No. 6523)

HEARING Re Motion Pursuant to Federal Rule of Bankruptcy Procedure 9019 for Order Approving Settlement Agreements Between the Trustee and Lehman Brothers (Luxembourg) S.A. and Lehman Brothers (Luxembourg) Equity Finance S.A. (LBI ECF No. 6601)

HEARING Re Motion Pursuant to Federal Rule of Bankruptcy Procedure 9019 for Entry of an Order Approving Settlement Agreements (LBI ECF No. 5483)

HEARING Re Lehman Brothers Holding, Inc. v Ford Global Treasury, Inc. (Adversary Case No. 12-01877), Motion to Dismiss

HEARING Re El Veasta Lampley v Lehman Brothers Holdings, Inc. (Adversary Case No. 13-01354), Pre Trial Conference

HEARING Re Plan Administrator's Omnibus Objection to Claims Filed by Deborah E. Focht (ECF No. 34303)

Transcribed by: Sheila Orms

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P R O C E E D I N G S

(Note: Audio begins mid-sentence:)

MS. MARCUS: -- seeks a six month extension until January 20th, 2014 of the order staying avoidance actions, which is currently scheduled to expire on July 20, and a similar extension of the time for serving the second amended complaint upon the defendants in the distributed action.

The plan administrator has filed the declaration of Lawrence Brandman (ph), a managing director of LBHI in support of the motion, and Mr. Brandman is present in court this morning.

As reflected on the agenda, there are only three outstanding objections, and one joinder to the motion. An objection has been filed by Nationwide Life Insurance Company and Nationwide Mutual Life Insurance Company, both of which are defendants in the distributed action and objected to the last extension request.

Ameritas Life Insurance Company filed a joinder to Nationwide's objection. And U.S. Bank and First Trust Strategic High Income Fund II also filed objections. There were no objections to the extension of the service deadline.

All of the objections, Your Honor, raise arguments that the Court has overruled, and even in the light of the passage of an additional six months, none of them demonstrates sufficient prejudice to justify termination of

the stay at this point.

As I have at each of the prior hearings seeking to extend the stay, I'd like to start by reporting on the benefits that the debtors have realized from the ADR process and the stay.

As indicated in the 43rd status report filed on June 19th by my partner, Peter Grumberger, as a result of mediation, the debtors have achieved settlements in 264 ADR matters involving 358 counterparties, generating in excess of $1.5 billion for the estates.

I note, Your Honor, that Mr. Grumberger just filed his 44th status report just moments ago.

Another measure of success is that 101 out of the 108 ADR matters in tier 1 that have reached the mediation stage have been settled. With respect to the avoidance actions specifically, more than 132 avoidance action defendants currently are subject to the SPB ADR procedures. As described in paragraph 21 of the motion, the 150 defendants in the non-distributed action, Adversary Proceeding No. 3545, have nearly all been dealt with. We have reached final resolution with over 110 defendants, and there are pending ADR proceedings with respect to 32 defendants. That leaves nine remaining defendants that are being further evaluated.

Adversary Proceeding No. 3547, the distributed

action is a bit more complicated. This matter is a defendant class action. The plan administrator has identified over 170 noteholders who have received $2.8 billion of distributions. Notwithstanding the size and complexity of this action, as described in paragraph 27 of the motion, the plan administrator has made substantial progress here too.

Since our last hearing in February, LBSF has served ADR notices upon 100 defendants. LBSF has also dismissed approximately 40 defendants, and is preparing ADR notices with respect to an additional 20 defendants. And it's continuing to evaluate approximately 40 additional defendants, some the subject of continuing discovery, and others are the subject of settlement discussions. Notably, none of the defendants in the distributed action that are not yet subject to the ADR proceedings have filed objections to the motion.

The foregoing statistics demonstrate, and I don't think anyone would disagree that the ADR program has been a resounding success. Absent the stay, much of that success would not have been possible, particularly within the time frame and with so little burden on the Court.

At the last hearing, the Court eluded to "the potential for incremental prejudice" --

THE COURT: I like that phrase.

MS. MARCUS: You'll like this one too, and said, "This cannot go on indefinitely." That was the February 13th transcript at page 51.

We're here today to tell you, Your Honor, that the potential incremental prejudice has not materialized, and that the plan administrator deserves a further six month extension of the stay.

Before we get to the merits of the objections, Your Honor, it's important to clarify for the Court as well as for the objectors, the relief that we seek in the motion. The motions seeks a six month extension of the stay that was originally entered by the Court in October 2010, shortly after the avoidance actions were filed. It is the stay that applies to all avoidance actions, whether or not they involve derivatives matters, and regardless of whether an ADR is pending as to such matter.

For purposes of today's hearing, let's call that the avoidance stay. In addition to the avoidance stay, there's another stay that is triggered by the commencement of an ADR proceeding, pursuant to the SPV ADR procedures order, which was originally entered by the Court in March 2011, and amended by order dated July 18th, 2012.

That stay, I'll call it the SPV stay, is triggered by the delivery of an SPV derivatives ADR package. Pursuant to paragraph 2(d) of the amended SPV ADR order, the SPV stay

continues until settlement or termination of a particular mediation. The motion before the Court today has nothing to do with the SPV stay. It is only a request to extend the avoidance stay.

I won't spend a lot of time on the objections, Your Honor, because you've heard all of them before, but I will briefly summarize them.

The Nationwide parties. The Nationwide objection is very similar to the prior objection filed by them, although the situation has changed since the last time we were before you. The Nationwide parties now are the subject of a pending SPV ADR. Consequently, they are subject to the SPV stay, and even if the Court denies the motion, the Nationwide parties would be stayed from continuing discovery and filing dispositive motions.

To the extent that the Nationwide parties have issues with the SPV stay, which is what they seem to be complaining about, this hearing is not the proper context in which to address such objections. The Nationwide objection is largely a collateral attack on the SPV stay, and that is improper for today and should be overruled.

To the extent that the Court believes that the Nationwide objection should be addressed in any event, we have the following observations.

Nationwide requests what it calls a narrow carve-

out for discovery and dispositive motions. The Nationwide parties, however, are two defendants in a multi-party action. If they want relief to pursue their statute of limitations' issues, other defendants will want to pursue other defendants and so-called limited issues, and we'll be going down the slippery slope that will completely undermine the benefits of the stay. If the avoidance stay were terminated, the burden on the Court would be considerable.

The plan administrator's other responses to this argument are in the record of the February hearing, as well as in our reply, and I won't get into them at this point.

The Nationwide parties also contend that the stay unilaterally benefits LBSF because the settlement strategy, "freezes the high watermark of the BNY decision." That's in the Nationwide objection at page 4. This argument, too, has been addressed and rejected by the Court numerous times before in response to prior objections by U.S. Bank and LB Australia.

The BNY decision is out there. Parties may disagree with it, and if they do, they can raise their arguments in ADR. Indeed as set forth in Mr. Brandman's declaration, parties have not been reluctant to argue the merits of the BNY decision in mediation.

Finally, the Nationwide parties again raise the issue of reciprocal discovery, we've addressed that in our

papers and in the last hearing as well.

The U.S. Bank objection. U.S. Bank in filing its fourth objection to the extension of the stay doesn't say anything that's new, other than that the tipping point has passed, and the Could should not further extend the stay. U.S. Bank asks the Court to accept arguments that the Court has already rejected on numerous prior occasions; however, these arguments are no more compelling today, and fail to establish sufficient prejudice, particularly in light of the substantial progress the plan administrator as demonstrated.

Many of the issues raised by U.S. Bank are based on their faulty premise that has been rejected by the Court previously, that the disputes will be resolved more quickly in litigation than they would be through ADR or negotiation. All of their arguments regarding the mere passage of time suffer from this law. In addition, there are other problems with their alleged prejudice, that are fully addressed in our reply.

The only arguably new contention from U.S. Bank is in paragraph 14, that the trustee is in possession of significant funds that remain quote, in judicial limbo. First, the characterization of the funds being in limbo is not appropriate in light of prior decisions of this Court that flip clauses are unenforceable ipso facto provisions.

The funds being held by U.S. Bank actually belong

to the estates. Moreover, limbo hardly constitutes prejudice sufficient to justify termination of the stay.

With respect to First Trust Strategic High Income Fund II, a defendant in the distributed action, they contend that if the stay is extended, that the Court should determine that no further prejudgment interest should accrue. But First Trust is also the subject of an SPV ADR and therefore, subject to the SPV stay.

As a result, the distributed action currently is stayed as to them, whether or not the Court grants the extension of the avoidance stay.

As noted in a footnote to its objection, First Trust's objection is similar to an objection previously made by U.S. Bank and rejected by the Court. U.S. Bank's objection, I think it was a year ago, dealt with the applicability of default interest. Notwithstanding the slight variation in the argument, the response is the same. As the Court noted, parties who are concerned about the continuing accrual of interest can deal with that risk by paying the amounts owed, and therefore, stopping the accrual of interest.

The continuing accrual of prejudgment interest arises from First Trust's failure to pay the amounts due, rather than from the imposition of the avoidance stay. Therefore, the interest does not warrant a denial of the

requested extension.

In conclusion, Your Honor, the estates have made the requisite showing that an extension of the avoidance stay is warranted under Section 105 of the Bankruptcy Code.

As the Court has noted on several occasions, and the objectors did not take issue with, quote, one thing is indisputable; the bankruptcy court has the discretion to manage its docket. That was from the June 15th, 2011 transcript at 39.

What we have here are a handful of objectors with their parochial interest in mind who raise vague and amorphous allegations of prejudice. In determining whether to sustain the objections, however, the Court should take into account more than simply the dispute between the estates and the objectors. Instead, it should take into account the impact that the relief sought by the objectors would have on the cases, the estate's ability to effectively resolve the numerous pending and potential causes of action, and the resources of the Court.

Viewed in light of the interests of all creditors, all avoidance action defendants, and the Court, Your Honor, the relief requested in the motion is necessary and appropriate, and the objections should be overruled.

THE COURT: Thank you. I'll hear from the objectors. Before I hear the first argument, I just wanted

to state something for the record.

Lawrence Brandman has filed certain declarations in connection with this hearing and certain other matters that are before the Court. I'd simply like to declare for record purposes that Mr. Brandman and I are members of a committee which is the ABI advisory committee on the safe harbors. As a result, I have informal contact with Mr. Brandman on a periodic basis. We have meetings every once in a while, the next one is scheduled for July 31.

In that context, we talk as committee members about issues that relate generally to the adequacy of the safe harbor provisions in their present form, and possible recommendations that we might make to the ABI Commission on reform of Chapter 11.

I want to be clear that we have, however, never discussed any issues that are particular to the Lehman Brothers' bankruptcy case. Although on occasion, matters that relate to the Lehman case come up for discussion within the committee. I simply wanted to make that clear, and to also point out that none of this impacts my review of the pending motion to extend the stay or my treatment of the declaration provided by Mr. Brandman.

MR. SMITH: Thank you, Your Honor. Good morning, may it please the Court, Quinton Lynn Smith here on behalf of Nationwide Life Insurance Company and Nationwide Mutual

Insurance Company.

I would note for the record the last time I was here, I was the sole objector to an extended stay. I now have two additional parties.

THE COURT: Do you feel better now?

MR. SMITH: It's a 200 percent increase, Your Honor, we're on a roll.

In 2010, the Court allowed its first stay in this matter, and at that time, the Lehman parties wanted a stay to allow them to finish service of process, and to identify parties and to identify the nature of the investment interests.

I was here at the hearing, although we weren't an objecting party in July of 2012, but I was at the hearing and attendance in July 2012, and at that time, Lehman had shifted by that time. And I wrote these words in terms of what it sought, it sought a quote, reasonable and modest stay, a year ago. And a year ago was to start settlement discussions in the derivatives litigation.

While in the last nine months, and we're not challenging the facts of what they're alleging or what they're stating in terms of a hundred notices going out in the last five months. They're contemplating another 20, but it's interesting and important to point out from a timing perspective, Your Honor, that in the declaration His Honor

referenced, the declarant said there's only three mediations scheduled out of all these.

Which begs a huge question, there is no description at all from Lehman ever of what it looks like, in other words, what the end looks like. When are we going to have a critical mass where we're going to be down to a certain number and now it's time to start the litigation? They offer no parameters, they offer no description, they offer nothing to the Court.

THE COURT: Can I break in and ask a very basic question? Currently as I understand it, your clients are in fact involved in an ADR process. And as described by counsel for Lehman, the ADR procedures order provides for its own stay while mediation is progressing.

To what extent as a result do you have standing on behalf of your clients now to complain about an extension of the avoidance stay?

MR. SMITH: I believe that as a result of being tagged with a piece of paper it's now worse. It's now worse. Now, we're -- there are two stays, redundant stays if the Court will.

THE COURT: Well, I'm not sure they're redundant, they're two --

MR. SMITH: Overlapping.

THE COURT: -- stays that overlap that mean that

even if you were to be successful in objecting to a broad based extension of the avoidance stay, that at least as to your clients, you would be subject to the ADR stay.

MR. SMITH: Well, I guess I'm compelled to preview a little bit of our strategy on that, Your Honor, because it does respond to His Honor's question.

The first of that ADR -- the first ADR order establishing that stay was entered in 2011 and then the current one in that same place is March 2012. The Nationwide parties were not parties in litigation at that time. We are now parties in the litigation.

By being tagged with an ADR notice, a piece of paper, and hypothetically, I only speak in hypotheticals, it can be an ADR notice that says, give us judgment. And yet, we will be stuck forever with no -- there's no termination. There's no termination of that stay.

THE COURT: Yes, there is. It extends for the duration of the mediation.

MR. SMITH: But that's just it, they control that. The mediation can go on for years. Out of 120 parties, we can be the last one up to bat, three, four, five years. And that's not an exaggeration, Your Honor. That's --

THE COURT: Well, I don't know if it's true. It may or may not be an exaggeration, but it's a rhetorical flourish.

MR. SMITH: The concern is, Your Honor, and this is what the U.S. Supreme Court has discussed in terms of immoderate stays. If there is a stay without any demarcation of an end on its face, that's an immoderate stay. By the way, they don't even respond to that argument in their pleadings. That it's an immoderate stay.

Now, we didn't object to the issuance of that order back in March 2012 because we weren't parties yet. But the reality is, and our perspective is is a two-step process, and that process includes opposing this stay, and then also moving to lift the stay in the ADR process as to us at least. Because it is endless and --

THE COURT: Do I understand that you are personally and on behalf of your clients hostile to the notion of good faith mediation to try to resolve this?

MR. SMITH: Absolutely not, Your Honor.

THE COURT: Then why are you being so obdurate about this?

MR. SMITH: Because it is our sincere belief, Your Honor, and I don't mean to come here to be a thorn in the Court's side --

THE COURT: You're not a bit. You're doing what your clients apparently want you to do, it doesn't mean you're going to prevail.

MR. SMITH: We sincerely believe, Your Honor, that

by allowing these stays to continue as they have, without even giving us reciprocity, they're allowed to do discovery --

THE COURT: I've heard this argument before about discovery, and their response to it, and I'm actually quite sympathetic to the response, is that issues relating to the statute of limitations or arguments that you might make that there are no viable claims as to you, are arguments that can be readily made to the mediator and evaluated by the mediator.

If you have litigation here, this is one of the great fallacies I think of litigation as a means to an expedient end, it rarely is. We have matters relating to Lehman Brothers that have been litigated fully and ably, and they end up in the district court and they end up in the 2nd Circuit, and there are matters currently pending in the 2nd Circuit. This bankruptcy case is about to approach its fifth anniversary in September.

There are certain matters relating to the Barclays' sale that was approved in September of 2008 that remain unresolved. The theory that litigation is a particularly efficient and important way to get to resolution I believe is overstated. You have certain rights, you can present those, arguments to the mediator, and if the mediation fails, you can present those arguments to me. And you'll

either prevail or not prevail with respect to those arguments.

But this is true as to you, and I think it's true as to everybody that's complaining about procedures that are designed to facilitate settlement. Litigation is not necessarily a good alternative to the procedures that are currently in place, and I'm not sure I accept your argument that you need to open up the litigation drawer of your desk and proceed in that manner if you're involved in a good faith litigation right now.

So one of the strange things about your argument is that if you are, in fact, engaged in good faith in a mediation, I shouldn't be hearing from you now. You should be focused on that. So one of my questions to you is, why are you pressing this issue today?

MR. SMITH: Because by not allowing to even apply the pressure of a statute of limitations argument that would actually be filed and they would have to address, they would have to address it, it is -- and this is sincere belief, Your Honor, this is not -- where there are stays, there tends to be often both parties will want a stay. In this case, it's just Lehman.

U.S. Bank has made its argument and I appreciate the Court has not accepted this argument, but it is a sincere belief by not even allowing -- not the open

floodgates, but just the statute of limitations argument, not every other defense, but just the statute of limitations argument, by not even being allowed to raise that issue to the Court not the mediator, which is a very different point of leverage, that's a very different point of leverage, then the table of the mediation is tilted toward Lehman. That's a sincere belief, Your Honor, and I'm not saying that to aggravate the Court, it's a sincere belief.

And that's why to use the Court's term, Nationwide is being obdurate about this, it feels going into the mediation, which we will participate in, the Court has ordered us to, and we will participate in. And we will comply to the letter and the spirit in a reciprocal fashion with that mediation process. And quite frankly, we hope we get to the top of the line in mediation. We hope we're not pushed at the end.

So we're happy to participate in the ADR process, but there's a sincere belief that going into that process, Your Honor, the table is tilted to their benefit. They don't feel the heat of anything. They don't feel the heat of anything. And telling the mediator good legal arguments doesn't change that, Your Honor.

I don't mean to say this to offend the Court, but those are our sincere beliefs.

THE COURT: Okay.

MS. APPLEBY: Good morning, Your Honor, Laura Appleby of Chapman and Cutler on behalf of the First Trust Strategic High Income Fund II.

We're here today as defendants in the distributed action asking that the Court, if it were to extend the stay by another six months be fair to all parties here, as we feel that the extension of the stay really only benefits to debtors to the detriment of noteholders, such as our client.

The debtors have requested an additional stay under their Section 105 equitable powers, and we feel that under the Section 105 equitable powers that if the Court does extend the stay by another six months, that along with that, it should condition the stay to stop the accrual of prepetition or excuse me, of prejudgment interest.

We do believe, of course, at some point that the stay has to end so that these matters can go forward to litigation if they're going to go to litigation. And as a further matter, debtors' counsel had mentioned that based upon a footnote in our pleadings, that our pleadings are very close to pleadings filed by U.S. Bank of last year.

We're not asking here for the Court to determine any interest rate here, we're not asking for the Court to look at the papers to determine any sort of percentages or anything like that. What we're asking is that if the Court under Section 105 extends the stay to the debtors, that

along with that, the Court should condition the stay so that it's fair to both the debtors and to noteholders, such as our client, to stop the accrual of prepetition interest.

THE COURT: That's a fairly extraordinary remedy you're asking for. And let me just ask you this question. Would you be precluded from arguing at some point in the future if you were engaged in litigation that prejudgment interest should be adjusted in some fashion to take into account the fact that the litigation itself has been prolonged by virtue of the stay? In other words, is there anything about the stay in its present form that takes away that argument to be made later?

MS. APPLEBY: I don't believe so, Your Honor, but --

THE COURT: I don't believe so either. So why should I do anything now that effectively gives you a right that you wouldn't necessarily have because a Court would only be able to assess the appropriateness of prejudgment interest after judgment, and would only be able to assess the rate and the period of time applicable, based upon the facts presented. Why should we prejudge that now?

MS. APPLEBY: Because we believe now that not only as Your Honor puts it, you believe that what we're asking for is somewhat unprecedented. But we also believe that maybe that's the incorrect word to use that --

THE COURT: I'm not sure if it's an incorrect word to use. We do a lot of unprecedented things in the context of the Lehman bankruptcy case. That doesn't mean they're inappropriate, but this may be.

MS. APPLEBY: Right. Well, what we're saying is that the stay also here is unprecedented. The stay has gone on for three years. The stay seems to be going on for an indefinite period. The debtors are, of course, asking for another six months here, but nothing is to say that in six months they're not going to come back to the Court too, and six months after that to continually ask for further stays. And we just believe that the balance of power right now with respect to the stay is in the debtors' hand. But by stopping the accrual of prejudgment interest here, we feel that that balances the power between the debtors and the noteholders and others such as First Trust, the First Trust Fund, who may enter and we currently are in ADR proceedings with the debtors. We were served last month.

THE COURT: Let me just understand what's happening from an economic perspective if I understand your argument. The noteholders that you represent, First Trust Strategic High Income Fund II being the party that you've put into the title of your limited objection, currently holds cash, correct?

MS. APPLEBY: Correct, Your Honor.

THE COURT: Has the use of that cash, correct?

MS. APPLEBY: As far as I understand, Your Honor, yes.

THE COURT: And can invest the cash?

MS. APPLEBY: Correct, Your Honor.

THE COURT: And realize the benefits if they're good investments of the use of that cash. The detriment associated with that is prejudgment interest. I cannot understand why your client is entitled to what amounts to a double dip benefit; exoneration with respect to the potential obligation to owe prejudgment interest, and the ability to continue to use the cash for free. You can also resolve the question by paying the money. You can pay the money, and argue about it later, and then not have the use of the cash, which is a business decision that your client could make. So I don't understand your argument.

MS. APPLEBY: I think first, Your Honor, with respect to the paying the cash over to Lehman now, we have certain duties and responsibilities to those holders in the fund, and I'm not sure if that's something that we could do at this point. Because the money is still -- there are issues still with respect to whether or not we owe the money to the debtors. We understand the debtors' earlier decision with respect to the flip clause or we understand the ramifications of that. However, if this were to go to

litigation that may be something as it's appealed that would be reversed in favor of the noteholders.

THE COURT: What year do you think that will be? Do you want to speculate as to what year we're talking about?

MS. APPLEBY: Right. Well, I think --

THE COURT: Assuming the stay were lifted today, and you were litigating questions to final resolution, do you think I'm still alive?

MS. APPLEBY: I would hope so, Your Honor.

THE COURT: I would hope so, too, but we don't know. So we're talking about, we're talking about a long period of time, the mere fact that issues relating to the Barclays' sale are currently before the 2nd Circuit almost five years after that order was entered, suggests we're talking about a very long time before we get absolute certainty as to some of these questions. Are you suggesting that there should be a five or eight year period of a holiday from having to pay prejudgment interest? That doesn't seem fair.

MS. APPLEBY: Not necessarily, Your Honor. Right now we're before the Court asking for the Court to stay the accrual of interest during the period of the stay requested by the debtors. Should the stay end and litigation continue or litigation presume, excuse me, that may be a different

matter.

THE COURT: Don't you think you could make the argument, though, and I don't want to make the argument for you, I'm just being hypothetical that, in fact, there is a tolling period that might apply to the running of prejudgment interest, but that's an argument that you would make only if, as, and when it becomes pertinent to make it?

MS. APPLEBY: I think it would be a possibility of an argument that we could make, but going back to the issue at hand, we think that if the Court in its equitable powers under Section 105 is -- intends to extend the stay as the debtors have requested, that that stay should be conditioned, so that's it fair to all the parties, at least during the six month period. We're only looking at the period in the motion as requested by the debtors.

THE COURT: Okay. You're looking for a proviso with respect to this particular six month extension; is that right?

MS. APPLEBY: At this point, Your Honor. I can't say what will happen in six months when we're back before the Court and the debtors have moved for another stay.

THE COURT: Well, we can't predict the future.

MS. APPLEBY: Yes, Your Honor.

THE COURT: Okay. Is there anything more you want to add?

MS. APPLEBY: Nothing here, Your Honor. Thank you.

THE COURT: Okay.

MR. TOP: Good morning, Your Honor, Frank Top from Chapman and Cutler on behalf of U.S. Bank National Association, and we're in a slightly different situation than some of the other objectors. We've actually been involved in a lot of mediations with the debtors. We've resolved some very successfully. We've partially resolved some of the transactions at issue, and then we've some mediations that frankly, you know, have gone nowhere. And, you know, the mediators made recommendations and both sides have declined it, and you know, in those particular instances, it's unfair to those particular noteholders to have to sit around and wait while a stay is in place in order to litigate their rights. Understanding how Your Honor might rule, they may choose to exercise appellate rights, they may choose not to exercise appellate rights, but that's a right that they ought to have.

Same with the partially mediated transactions, where we've partially settled, but we have noteholders in there that just for whatever reason, don't agree with the debtors' viewpoint on the flip clause, and you know, prefer to litigate it either on principle or because they don't feel they're getting enough. Those noteholders ought to be able to pursue rights and to litigate that matter and have

it heard before Your Honor. And if they choose to exercise appellate rights, exercise appellate rights.

The whole notion that these adversary -- these proceedings are so complex that they can't be handled just begs a question, well, why don't we start handling them now. I mean, they are very, very complicated. There's all sorts of transactions involved in each one, there's also hundreds of defendants in the distributed funds case, and at some point in time, we all need to sit down and figure out how we're going to handle those matters. Because as successful as the mediation program has been, and again, as I have admitted, we've been very successful at some of our mediations, there are a number of mediations that just don't turn out successfully, and those people ought to be able to pursue their -- whatever rights they feel they have.

THE COURT: Do I understand, just so I'm clear, that your argument is that any extension of the stay should not apply as to noteholders represented by U.S. Bank as trustee, that have participated in mediations that have ended unsuccessfully and are in effect in a different class. The mediation has been pursued in good faith, but has not resulted in a settlement. Is that the essence of the argument?

MR. TOP: That is one argument. I do also agree with the attorney from Nationwide that the fact of the stay

itself creates certain leverages, and that, you know, I believe that, you know, the fact that the stay is in place creates a negative leverage for noteholders in pursuing litigation and that --

THE COURT: Could you explain that, please?

MR. TOP: Well --

THE COURT: What is it about the existence of the litigation stay that favors one side versus the other?

MR. TOP: Because at this point in time, there's no threat that the matter will be litigated before this Court, and that a party litigating that matter, presuming it gets a decision, exercises an appellate right to -- and prevails on an appeal. That in and of itself creates leverage that, you know -- you know, these facts have no idea how long it's going to take to have this matter resolved, and they may be entitled to some of that money, maybe not. But they ought to -- they shouldn't have to wait, you know, ten years in order for that to occur.

THE COURT: If I said ten years I'm sorry I said it. I think I said eight. And I think what I said was from five to eight years to get finality with respect to appellate issues that might end up in the Supreme Court.

My frame of reference is how long it has taken to litigate certain matters that are currently being reviewed by a panel of judges from the 2nd Circuit in connection with

the Barclays' sale. I'm familiar with other litigation, massive litigation in the Lehman case, one involving JPMorgan Chase where the discovery alone has been going on for I think three years.

So my perspective is that nobody can predict the duration and the expensive litigation, but that one thing we know unstayed litigation carries with it a host of risks for both sides. As well as significant uncapped expenses associated with litigation that litigation in the ordinary course is burdensome and distracting, that's why parties in settlement agreements always say, to avoid the burdensome distractions of litigation, we've agreed to settle.

Well here, the existence of the stay doesn't avoid the burdens and distractions of litigation. It merely delays and defers, and perhaps completely avoids if settlements are reached those burdens and distractions.

So in what way really is this prejudicial?

MR. TOP: Again, I think it's a matter of time. I think it's a pure matter of time. I mean again, we have that one class of noteholders that have tried, and they didn't reach some kind of a resolution. For those that haven't, you know, again this is very complicated -- very complex adversary proceedings, there's lots of parties to it. If we don't start determining how we're going to handle that, those adversary proceedings now, when are we going to

do that? I mean there are ways of handling it. There are ways of handling --

THE COURT: Well, I hear you but let me ask you a question because your position is a difficult one for you individually because on the one hand you say this process has been at least in certain instances that you personally are familiar with, this process has been extraordinarily effective and has worked. And there are some examples where it hasn't worked.

You're suggesting with respect to the fact that some mediations have failed and the fact that there are certain litigation rights that are being delayed that we should effectively open up the doors to all litigation with respect to the entire program, trash the ADR program as a result, because parties will become actively involved in litigation, and take the good of the program and throw it out.

MR. TOP: I'm not --

THE COURT: That makes no sense.

MR. TOP: I'm not suggesting that at all.

THE COURT: What are you suggesting then?

MR. TOP: Even if the stay were not in place, we would still participate in mediation if that's what the Court wanted. The stay of litigation has nothing to do with whether we would participate in mediation.

THE COURT: That's a different question. Parties in active litigation may choose to mediate, may be directed to mediate, but in multiple examples that I am personally familiar with, parties don't put down their weapons necessarily while they mediate, they do both. They say, we're not going to change the briefing schedule, we'll mediate all right, but we're going to file our briefs. We're going to put as much pressure on the other side as we can. We're going to spend as much as we can to make the other side feel that it's punishing not to settle. They use all available resources to maximize their relative position. Here we have something different, and I would suggest better.

We have a level playing field in which what you suggest as a theoretical prejudice is, in fact, no prejudice at all. Nobody is incurring litigation expense. Nobody is changing the status quo, but everybody has the right to argue that there is the potential to change the status quo, and to argue that to an independent and unbiased and skilled mediator sounds like a great program to me. Why isn't it a great program?

MR. TOP: Again, at least with respect to people who have participated in the program, they're -- they participated in good faith, no resolution was reached, and they're just sitting around waiting for their matter to get

resolved. I mean, I don't know when this is ultimately going to get resolved.

And in any event, this whole motion that litigation is going to be incredibly expensive, I would presume that before this litigation actually initiated that there would be some kind of ground rules set for the litigation.

For example, in the Delta Airline case where we had a lot of tax indemnity agreement type claims, they picked a couple of standard type provisions, and they litigated that first, so people knew where that stood. I mean, there's all sorts of ways of handling the litigation so that the cost isn't burdensome on either side. And I think that that would probably be appropriate in these particular cases.

But I don't suggest to trash the ADR process, I think it's worked in some cases, I think it hasn't worked in others. But again, I think a stay against all litigation is, at this point, after three years not appropriate.

THE COURT: If you read the debtors' papers as I did, including Mr. Brandman's declaration, in support of the motion, one of the predicate theories that underlies the success of the ADR program is the existence and continuation for a period of time of the stay. Do you dispute that?

MR. TOP: Yeah, I don't -- yes, I do.

THE COURT: Well, obviously you're standing here and objecting to --

MR. TOP: That's right.

THE COURT: -- an extension of the stay, so I'm giving you rhetorical opportunity to somehow get out of the box you're in, because you're arguing out of both sides of your mouth. On the one hand you're saying that the program has been quite successful, on the other hand, you're saying as to those that can't resolve their disputes in mediation, they shouldn't have to wait any longer, right?

MR. TOP: That's correct.

THE COURT: Well, if you're balancing some parties that have not succeeded in mediation against a whole portfolio of others that are in a process where the stay is beneficial, are you arguing only with respect to a subclass or are you arguing with respect to the entirety of the stay? I'm trying to understand if what you're looking for is a carve-out or if what you're looking for is no extension of the stay full stop.

MR. TOP: I do not believe a stay is necessary to maintain the integrity of the ADR process, and so, yes, we would be arguing that the stay should be lifted in connection with that.

THE COURT: Okay. So you are using the carve-out argument as one of your arguments for there being no extension of the stay notwithstanding the fact that you also acknowledge that the ADR program which includes the stay has

been effective.

MR. TOP: I agree that we have reached resolutions through the ADR process, I don't necessarily agree that it's because the stay has been in place.

THE COURT: Okay. I think I know enough about your argument, thank you.

MR. TOP: All right. Thank you, Your Honor.

THE COURT: There's a joinder of Ameritas. I don't know if you want to say anything?

MR. ETKIN: Your Honor, I don't have anything -- I need to add anything to the arguments.

THE COURT: Okay.

MR. ETKIN: We can file a joinder and support those arguments.

THE COURT: Does anyone else before I hear from debtors' counsel, we have a fairly full courtroom here today, is there anyone else who wishes to be heard with respect to the extension of the stay?

(No response)

THE COURT: Okay. I've heard no response and so this is a good time to hear from debtors' counsel.

MS. MARCUS: Your Honor, unless the Court has further questions for me, I don't have anything else to add.

THE COURT: Okay. Counsel for Nationwide is correct, there are more supporters of the Nationwide

position that the stay should not be extended. I've reviewed the papers, and I've listened with care to the arguments. I view this as a very difficult issue and it becomes more difficult each time we have one of these hearings relating to a six month extension.

One of the embedded issues in the objections is when will this end. At what point does litigation move forward and at what point do we know that the ADR program has effectively run its course, I can't answer that at the moment, and I don't know that the debtors can either. And that's part of what makes this a difficult decision.

The benefits associated with extending the stay of avoidance actions are obvious. I accept Mr. Brandman's declaration, really the only evidence that has been offered to support the six month extension of the stay, and I also accept the periodic letters that are received from Lehman's counsel reporting on the progress of the ADR program. Those letters confirm that this program has produced material economic benefits to the estate, but the program has also correspondingly produced benefits to the counterparties, all of whom avoided the expense, distraction, and burden of litigation.

I do not accept the argument made that the stay is anything but neutral. The only way that the stay may be viewed as favoring the debtor is in the results I've already

identified. If the program has produced in excess of $1.5 billion in receipts, that suggests that this is beneficial and that's also a good economic reason for the plain administrator to want the stay to be extended.

I overrule all of the objections and I am extending the stay of avoidance actions for an additional six month period. But I do so with a sense that this has to come to an end. And so the debtors should not assume that when next they make a request to extend the stay, that I will grant the same relief that I am granting today.

I will need a showing beyond that of the Brandman declaration. I'm not sure what that showing needs to include, but at some point six month stays when tied together become multi-year stays, and a multi-year stay becomes difficult to justify.

I believe that what may be required, as we approach the end of 2013, is a particularized and focused agreement of parties to the litigation to extend the stay or to voluntarily agree to defer litigation activity to accommodate ongoing ADR activities. Part of the problem here is that this is a stay that is being judicially imposed as to a class of defendants that are presumed by the debtors not to be objectors. The debtors' papers include references to that inference.

I do not know whether that is a reasonable

inference. I do not know whether the objections that we've seen today are outliers or actually representative of attitudes that might be supported by those affected by the stay.

So while I am not saying this is the last and final extension of the stay, I am saying that it is likely going to be more difficult to get a further extension, absent good cause shown and particular evidence presented as to how the stay truly benefits the ADR process and how the stay is not prejudicing parties affected by the stay.

I will entertain an appropriate order, and my dicta does not need to be in the order.

MS. MARCUS: Thank you, Your Honor. We'll submit an order at the conclusion of the hearing.

Your Honor, we're going a little bit out of order and we're going to proceed to a matter that's on the SIPC calendar next.

THE COURT: Okay.

MS. MARCUS: Mr. Greilsheimer will handle that.

MR. GREILSHEIMER: Good morning, Your Honor, Jeff Greilsheimer, Hughes, Hubbard and Reed for the SIPA Trustee.

I'm here on matters two, three and four on the agenda. Matters two and three are settlements with affiliates. The first one is a settlement with Lehman Brothers Securities, which is the Curasel (ph) based entity.

It resolves an $11 million customer claim for an allowed claim of a little under two and a half million dollars. There have been no objections. The settlement also includes full releases, mutual releases between the two parties. We ask that it be approved.

THE COURT: It's approved.

MR. GREILSHEIMER: Agenda item three is a motion for approval for settlements between the trustee and Lehman Brothers Equity Finance, a Luxembourg entity, and Lehman Brothers Luxembourg.

The first of those is a $58 million customer claim that is being resolved for a $5 million customer claim. Again, full mutual release is being exchanged. The second settlement with LB Luxembourg resolves $13 billion worth of stock trading -- stock lending transactions between the two entities. It results in a $158 million general creditor claim against LBI. We ask that both of those settlements be approved as well.

THE COURT: They're approved.

MR. GREILSHEIMER: Item number four is the settlement with Bankhouse (ph). LBHI has filed an objection. We've had a number of discussions over the last several months and the last week or so. The parties have agreed that we should try and resolve the objection consensually. It may take a little bit of discovery,

whether it be informal or formal discovery. The parties would like to try and put together a protocol to do that consensually, and perhaps come back to the Court in October if we are unable to reach a consensual resolution of the objection.

THE COURT: It sounds like a good approach.

MR. GREILSHEIMER: Thank you, Your Honor. That's it on items two, three and four.

THE COURT: That means that you can be excused.

MR. GREILSHEIMER: Thank you very much, Your Honor.

MS. MARCUS: The next matter on the agenda, Your Honor, is the Ford Global adversary proceeding and there's a motion to dismiss that's before the Court.

MR. MCCOLLOUGH: Good morning, Your, Aaron McCollough from McGuire Woods for Ford Global Treasury.

We're here on a motion to dismiss certain counts of the complaint filed by Lehman Brothers Commercial Corp and Lehman Brothers Holdings, Inc. as plan administrator, and specifically we're seeking to dismiss Count II of the complaint, which is an automatic stay claim and Count III of the complaint which is a turnover count.

We're also seeking to dismiss a portion of Count I insofar as it seeks damages under Section 562 of the Bankruptcy Code. Count I also includes a claim for damages calculated under state law, but we're not seeking to dismiss

that claim through this membership. So that will proceed regardless of how this motion is ultimately resolved.

THE COURT: Let me ask you a question about the calculation of damages under state law. Would the granting of your motion to dismiss under 562 preclude any damage calculations consistent with 562 standards?

MR. MCCOLLOUGH: Well, I think, Your Honor, our view is that the 562 calculation is really consistent with the calculation that's required under the ISDA master agreement, and it's a calculation that satisfies the ISDA settlement provisions would also satisfy 562. So I don't think they're mutually inconsistent.

THE COURT: Then why are you pressing a motion to dismiss on 562?

MR. MCCOLLOUGH: Well, if they are --

THE COURT: I assume you're pressing it because you see an economic advantage in doing so.

MR. MCCOLLOUGH: Well, Your Honor, if they are consistent we think it's redundant to have two separate claims seeking damages under two different theories. If there --

THE COURT: That's not the reason you're doing it. You would only be doing it because it's economically advantageous to do it.

MR. MCCOLLOUGH: Well, that's the other reason. If

they produce different results, as we must assume Lehman believes by pleading them in the alternative, we're seeking to dismiss 562 damages because we view that 562 is not applicable to this proceeding.

THE COURT: I understand that's your belief otherwise you wouldn't be pressing the argument, but you wouldn't be pressing the argument unless you viewed it as economically advantageous to do so; otherwise, it's just a theoretical proposition.

MR. MCCOLLOUGH: Well, I think, Your Honor, our view is that the settlement provisions of the ISDA are very carefully structured, very detailed, and they provide certainty to parties and how they respond and how they address them. 562 has very sparse legislative history, it's not a provision that's been litigated frequently, and so there's greater uncertainty as to how --

THE COURT: Including uncertainty as to whether it applies in the instance of this motion to dismiss.

MR. MCCOLLOUGH: That's correct, Your Honor, that's correct. So we are seeking to dismiss just the 562 component, but not the state law component.

Your Honor, if I may put the motion in context by just walking through some of the background --

THE COURT: Including the failed mediation?

MR. MCCOLLOUGH: I'm sorry?

THE COURT: Including the failed mediation?

MR. MCCOLLOUGH: Sure, sure, including the failed mediation. The --

THE COURT: You recognize that this is one of the very few outliers of a mediation that has failed, and that the amount involved is not that great.

MR. MCCOLLOUGH: I --

THE COURT: Both as to Ford and as to Lehman which makes the Court without wanting to know any of the specifics somewhat skeptical as to how the parties were unable to reach an accommodation here, unless one side or the other is being very difficult.

MR. MCCOLLOUGH: Well, Your Honor, we have certainly --

THE COURT: I view based upon your pleadings that your client is being difficult, because your pleadings suggest a scorched earth approach to this litigation. I don't like that. I'm letting you know that now.

MR. MCCOLLOUGH: Well, Your Honor, I certainly don't -- it's not our intent to take a scorched earth approach, and in terms of the mediation we certainly had hoped to resolve it in mediation and participated in good faith. A separate Ford entity that also had a claim that was mediated under the SPV ADR procedures reached a consensual resolution in that matter, and we, for various

reasons, were not able to reach a --

THE COURT: I don't need to know the reasons.

MR. MCCOLLOUGH: Sure. But we couldn't in this matter, and I think because of a statute of limitations issue, Lehman filed a complaint promptly after the close of mediation.

THE COURT: Okay.

MR. MCCOLLOUGH: The background, Your Honor, is that we had a portfolio for an exchange transactions with Lehman Brothers prepetition, Lehman Brothers Commercial Corp. Although the amounts in dispute in this litigation I agree are in the grand scheme of Lehman matters fairly modest, the portfolio itself was significant. It was over $2 billion of notional value and it involved a dozen at least currencies, so it was not a small portfolio.

Now, after Lehman Brothers Holdings filed its bankruptcy case, Ford terminated its transactions and in accordance with the ISDA went out and sought quotations from four different banks, but given the market conditions at the time and the size of the portfolio was told that it would not be able to receive any actionable quotations in response.

So Ford promptly went out sought to replace the transactions on an individual basis because it could not do so on a portfolio basis. And within a week, it had replaced

all but one of the transactions.

THE COURT: So you acknowledge that one of the transactions is post-petition?

MR. MCCOLLOUGH: Yeah, we do. We do. There was one fairly modest transaction that was post-petition.

THE COURT: At some point you're going to have to explain to me whether your motion to dismiss applies to that transaction. Does it?

MR. MCCOLLOUGH: It does. It does, Your Honor. It applies to all of them. We feel that the operative facts for all transactions, even the transaction that was replaced post-petition, the operative facts are still -- all occurred prepetition, which means that all of the parties' rights with respect to termination, all of the parties' rights with respect to calculation of damages approved and were fixed in the prepetition period. So that when LBCC filed, even if one of these transactions had not been replaced prior to that date, all of the parties' rights were already fixed with respect to those.

THE COURT: Okay. I'm not going to take you out of order by focusing too much on the prepetition question, but you have to recognize that I am aware that there is nothing in the applicable section or in its legislative history to the extent that's even meaningful to look at that supports your argument.

MR. MCCOLLOUGH: Well, Your Honor, I agree that the statute on its face does not state that it should or should not apply to prepetition transactions. It just says what it says without --

THE COURT: And I understand you make a statutory construction argument in the context of a motion to dismiss as to why it should not apply to this situation.

MR. MCCOLLOUGH: Your Honor --

THE COURT: Suffice it to say without going into it deeply that I am not granting this motion to dismiss today or maybe ever. This is the sort of issue that shouldn't really arise in the context of a motion to dismiss. It's frankly too important.

If this is going to be the first case that decides whether or not the section of the Bankruptcy Code in question applies to transactions that arise just before a bankruptcy filing, as opposed to just after a bankruptcy filing, I want to do so in the context of a full record, that would include such discovery as the parties wish to conclude, and either an evidentiary hearing or summary judgment briefing.

So I'm just letting you know now that I've read enough of your papers to know that you have an argument, but I'm not going to rule on that argument in the context of a motion to dismiss. And denying that motion to dismiss, it's

completely without prejudice to your ability to reurge the very same theories or other theories that you may come up with after the case has progressed more.

MR. MCCOLLOUGH: I understand, Your Honor. I don't want to waste more time on 562 if that's -- if it's not a useful endeavor.

I do have one point that I would make that if you'll indulge me maybe.

THE COURT: I will indulge you.

MR. MCCOLLOUGH: The reference to legislative history is right, the legislative history is very sparse. There is one statement in the legislative history there that I think does touch on this issue, and --

THE COURT: I think you mention that in your reply papers.

MR. MCCOLLOUGH: I think we mentioned some of the legislative history but there's one provision I don't think we focused on in our papers that I would note to you here. And I'm happy to -- I have a copy if you'd like to look at it.

THE COURT: I don't know that I want to look at it yet, but you can certainly --

MR. MCCOLLOUGH: Okay.

THE COURT: -- tell me about it.

MR. MCCOLLOUGH: Sure. There's a discussion of --

although it's expected, and I'm quoting from the center report 256, 109th Conference report 10931, "Although it is expected that in most circumstances damages would be measured as of the date or dates of either rejection or liquidation, termination or acceleration in certain unusual circumstances, such as dysfunctional markets or liquidation of very large portfolios, there may be no commercially reasonable determinance of value for liquidating any such agreements or contracts, or for liquidating all such agreements and contracts in a large portfolio on a single day."

That's a statement that we did include in the papers that discusses, you know, what 562 -- how it would be applied in dysfunctional markets. But it's the next sentence that I think is notable. It goes on to say, "It is expected the measuring damages as a date or dates before the date of liquidation, termination or acceleration will occur, only in very unusual circumstances."

And it's that word before I think is notable. Because what I think 562 is really intended to do is prevent trustees, debtors, or counterparties from seeking to terminate or reject a derivative contract nunc pro tunc to a date before, including the petition date. I think Collier's notes that there was a concern prior to enactment of 562 that parties may sort of time rejection or termination, but

purport to make it retroactive, which would undermine market -- the market participant's ability to evaluate their risk.

And so 562 eliminates that prospect by saying damages are a calculation as of this future date, not as of the petition date. And I think the inclusion of that word before in the legislative history makes clear that what Congress was doing was not trying to impinge upon state court rights and the rights in the ISDA agreement or other market standard agreements to calculate damages as of that later date, what they're trying to do is prevent debtors, trustees, and counterparties from relying on equitable bankruptcy principles to make it retroactive.

THE COURT: You don't know that.

MR. MCCOLLOUGH: Pardon?

THE COURT: You're assuming a lot in your argument, and I've indulged you the point of giving an opportunity to make an argument on a point that I've already told you I have no intention of ruling on in the context of a motion to dismiss.

The question of whether the date or dates of liquidation, termination or acceleration are dates that speak to a prepetition or post-petition period happens to be a question that no one yet knows the answer to. And the facts surrounding the termination of this particular ISDA, which presumably will be developed in discovery, and the

timing of that relative to the filing date of this particular Lehman affiliate's bankruptcy may be material in assessing the proper interpretation of 562 in this context.

I know that the perpetual or BNY corporate trustee decision however you want to refer to it has been alluded to in the context of this morning's hearing already, and there is briefing on it in connection with this motion to dismiss as well. But I will simply make this observation. Arguments of a general nature as to applying 562 to prepetition conduct cannot be made on a general basis when the argument is being made in the context of the Lehman bankruptcy filings. And there is other litigation pending before me in reference to the Ballyrock case, where certain statements made in the perpetual decision are being further examined. That is another reason why this is not a suitable subject for resolution on a motion to dismiss.

So you've lost without prejudice as to that argument.

MR. MCCOLLOUGH: Well, I thank you for indulging me. Thank you for your patience. I can still address, if Your Honor would like, the other two aspects of the motion which are the request to dismiss the automatic stay and the turnover count. Frankly, I don't have much. I think these issues were fairly well briefed and the parties' positions are pretty clear.

THE COURT: They are. Let me ask you why you care about these particular arguments, and one of the things that occurs to me, and I'd like to hear your response to this, whatever arguments you may make today about the automatic stay and its applicability to a reorganized debtor would seem not to apply as to the entire period of time during which the debtor was a Chapter 11 debtor, and before the effective date of the plan.

Because there is an argument that there was a wrongful retention of an asset of the estate, why shouldn't the debtor, the reorganized debtor, be able to make arguments that are set forth currently in the complaint?

MR. MCCOLLOUGH: Well, I'll say that this argument about the continuation of the stay and the besting of the assets post effective date and the post effective date LBCC I think are not the primary arguments here. I'll answer your question which is that the reason why it still warrants dismissal is that that's not the count that the complaint asserts.

The complaint asserts a -- seeks a declaratory judgment that the stay is being violated, which in our view, is not the case because the stay is not applicable. The count is not seeking a remedy for some prior damage. But it's really, I think, sort of a moot point because in our view, whether the stay applies or not, whether at one point

or whether or not there's a bankruptcy estate anymore, and I think the answer is there's not, this was never an asset of the bankruptcy estate. This is not a dispute about ownership of any identifiable funds, this is not a dispute about, you know, whether a liquidated non-contingent matured claim has to be paid. This is a dispute about the interpretation of a contract.

And we think there is authority and common sense that says that can't be the basis of an automatic stay claim. The common sense approach which is -- I'm sorry, the authority which is probably more interesting to Your Honor is in the reference in fraudulent transfer context in the avoidance action context where the debtor or the trustee makes a claim and seeks to have the transferred asset be deemed an asset of the estate for purposes of the automatic stay. And Courts are uniform in New York, Southern District of New York District Court and Bankruptcy Court that if a -- that the assertion of an avoidance action does not create a property interest of the estate, in the asset that was transferred by the estate to the third party.

It's only when the asset is actually recovered and the debtor obtains title to those funds, the debt becomes an asset of the estate. Until that happens, the debtor just has a claim for recovery. And a claim is not a right or an interest in the property claimed.

So I think we did make that point in our papers, and I would just reiterate it here, and for that reason, we think the -- regardless of the continuation of the automatic stay post effective date, the claim should be dismissed because there really is no asset that was or could be a part of the estate that Ford could be deemed to have exercised control over.

THE COURT: Well, this is not the only case on my docket involving derivatives. And during the course of the bankruptcy case itself, from time to time, the debtors would bring motions or adversary proceedings asserting that there had been a stay violation associated with the retention, wrongful retention of property in derivatives transactions that were as to Lehman in the money transactions.

In what way is this different?

MR. MCCOLLOUGH: Well, Your Honor, I don't know the circumstances of the prior matters whether it was disputed as a matter of contract interpretation that the amounts demanded by Lehman were payable or not. If it was an undisputed amount that was sitting in an escrow account or was cash collateral or, you know, whatever the case may have been, when you have an undisputed fixed payment obligation, then I think then it may fall within the automatic stay.

What this is, is something I think at least on -- if I'm describing those circumstances correctly, and I don't

know if I am, but I don't think that applies here.

THE COURT: Let's just one example, so we don't have to talk --

MR. MCCOLLOUGH: Sure, sure.

THE COURT: -- hypothetically. I'm trying to understand your position.

In a reported decision involving Bank of America I found that the 362(b)(17) exception to the automatic stay did not apply. And that matter ultimately was resolved. There, be it they had cash collateral; here, you have cash. There is a dispute as to whether or not you should be holding that cash. You've known about that dispute for a really long time. You knew about that dispute before there was mediation, you knew about the dispute before there was litigation. You knew about that dispute effectively throughout the entire bankruptcy case. I think that's the timeline we're talking about.

MR. MCCOLLOUGH: Well, I think, Your Honor, as an initial point that I think the first time a different amount was asserted as owing was actually several years after our payment to Lehman in 2008 was made. So there was a lengthy period before there was any dispute or before Ford was aware of any alternative calculation that Lehman might be asserting.

THE COURT: When did you first learn about it?

MR. MCCOLLOUGH: It was -- the first time we heard a demand for a number was an ADR notice that was served on Ford.

THE COURT: Was when?

MR. MCCOLLOUGH: An ADR notice that was served on Ford. I don't know what -- it was probably -- it was more than a year ago, I don't know what the exact date of the ADR notice.

THE COURT: Okay.

MR. MCCOLLOUGH: It was more than a year ago. But, Your Honor, I think the difference is that what we're talking about and Your Honor says that there's cash that's being disputed, but it's -- there's no dispute about who owns the cash. Ford owns its cash, Lehman does not, by making a demand own or have an interest in any identifiable cash. There's no prejudgment attachment, there's no -- there's nothing that identifies any specific funds unlike in the cash collateral situation that could possibly form the basis for an interest of the estate to attach.

Instead, there's just a general demand for payment. And, Your Honor, I would suggest that if a general demand regarding a disputed contractual interpretation could be the basis of an automatic stay claim and this is different from I think a cash collateral situation. It really causes serious problems for a lot of issues which I've been not

talking about, but core, non-core bankruptcy court jurisdiction issues.

If a motion in a Chapter 11 case can resolve a breach of contract action, a state law breach of contract dispute, I think it poses serious questions about how that would be treated after Stern v Marshall and under Marathon and Grantsenaro (ph), but I don't think it's -- I don't think we're dealing with that here, because what we're talking about is an unliquidated, disputed, contingent, unmatured claim. And I just don't see how Lehman can get to the point that they have an interest in any identifiable funds that would constitute an interest of the bankruptcy estate.

THE COURT: Okay.

MR. MCCOLLOUGH: The other claim, Your Honor, is the 542 claim, and we've noted the authority that 542 should not be used to liquidate a disputed breach of contract claim, and we think that authority is pretty expansive and persuasive.

In its opposition papers, Lehman really didn't take issue with that. It focused on jurisdiction and core and noncore issues, which frankly we just think are not relevant to the decision as to whether Count III of the complaint states a claim upon which relief can be granted under the standards in 12(b)(6).

There's no jurisdiction core/noncore analysis in the 12(b)(6) standard. Either it states a claim or it doesn't. And it's our view that it does not. So we would ask the Court to follow the other authority from this district that concludes that a 542 claim should not be used to liquidate a disputed breach of contract claim.

THE COURT: Okay. Thank you.

MR. MCCOLLOUGH: That's all I have, Your Honor.

MR. LEMONS: Good morning, Your Honor, Robert -- excuse me, excuse me. Robert Lemons from Weil Gotshal and Manges on behalf of LBHI and LBCC.

In light of the colloquy you just had with Ford Global's counsel I'm going to be very brief, Your Honor. Suffice to say that we, of course, disagree with Ford Global and believe that 562 on its face and for good policy reasons does apply to Ford's termination. But that as Your Honor has stated will be litigated fully if the parties don't settle first.

I don’t think there's any need for Your Honor to deal with the motion with respect to the automatic stay or turnover actions, since their existence or non-existence doesn't change the case going forward. There's going to be the same discovery, the same briefing. I don't think they need to be dealt with on a dispositive basis at this time.

Having said that, though, I do want to spend just a

minute discussing the points about the automatic stay that Ford Global's counsel just made. I thought it was interesting that Your Honor brought up some of the earlier derivatives litigation that we've had in this case. I wasn't thinking about the Bank of America case, although that does raise the same issue, but I was thinking, Your Honor, about the Metavanta case.

THE COURT: So was I.

MR. LEMONS: Which is --

THE COURT: So was I. I didn't mention Metavanta because it wasn't -- everybody talks about it, but it never rose to the level of anything written down that was taken from the transcript. But it's an important decision.

MR. LEMONS: And, of course, I agree with that, Your Honor, and just --

THE COURT: What, that it's an important decision or that it was just in the transcript?

MR. LEMONS: Yes. But I think a very important fact about Metavanta that addresses one of the points that Ford Global's counsel raised is that in Metavanta there wasn't a specific fund or cash collateral sitting in an account. There, as I'm sure Your Honor recalls, there was a counterparty, Metavanta who simply refused to perform under the swap agreement because it did not believe that Section 365(e) of the Bankruptcy Code applied to it.

Here, Your Honor, I would argue we have exactly the same situation. We've got Ford Global who is refusing to perform and pay amounts that are due under the swap agreement, and one of the bases for its refusal to perform is that it believes that Section 562 of the Bankruptcy Code does not apply to it.

So, Your Honor, I think that Metavanta in this case are really on all fours. And so notwithstanding the fact that I don't think Your Honor needs to rule on either of these issues today, if Your Honor, you know, does feel like you need to rule on any of these issues, I think there's really no basis to accept Ford Global's argument about the automatic stay.

THE COURT: Remind me about one aspect of Metavanta, it was a while ago. It's my recollection that it arose in the context of a motion in which Lehman was seeking to, among other things, enforce the automatic stay as to Metavanta. Am I right about that?

MR. LEMONS: That's correct, Your Honor. In Metavanta, there was a swap that had not been terminated and Metavanta owed periodic payments to Lehman under the swap, except for it tried to rely on Section 2(a)(3).

THE COURT: I recall it well.

MR. LEMONS: So unless Your Honor has any more questions, I don't have anything else to add.

THE COURT: No, that's fine, thank you.

I think what makes the most sense is to simply deny the motion to dismiss in its entirety without prejudice, as to all of these arguments. And to give the parties an opportunity to more fully explore the issues in discovery, the very same legal issues or perhaps new ones can be identified for purposes of dispositive motion practice, I'll simply state the obvious which I think is implicit in the comment made by counsel for Ford Global.

In the context of the Lehman Brothers' bankruptcy, and certain in the context of Ford Motor Company and all of its affiliates, while we're talking about dollars that one would pay close attention to, if we were dealing in a different context, we're not talking about all that much money for these enterprises.

The legal issues particularly those arising under 562 are unsettled and the parties, even though they have been through a failed mediation might consider meeting and conferring to see if it's possible through each business, a resolution here with or without the involvement of the mediator here who is last entrusted with that assignment.

If Ford is not inclined to return to the settlement table, I'm not going to direct it or even strongly encourage it. I'm simply suggesting it. As I stated a little bit earlier, I conclude that Ford doesn't want to pay this money

because there's already been a motion to withdraw reference, there's already been a fairly significant briefing process with respect to the motion to dismiss, and there is the obvious conclusion to be drawn here that Ford views this as a simple breach of contract matter to be determined under state law principles of damage calculation, and that Lehman views this as a bankruptcy matter that may include enhanced recoveries due to a violation of the automatic stay which has been alleged, and an alternative means to calculate damages pursuant to 562.

I think the parties should simply take those risks into account and see if it's possible to reach a solution. If not, it will be a fascinating matter for me to write on, and I look forward to doing that if you fail to reach a settlement.

Somebody has to be the first to write about 562.

MR. LEMONS: Thank you, Your Honor.

THE COURT: Okay. Thank you. I'll entertain an order denying the motion to dismiss without prejudice for the reasons stated on the record.

MS. MARCUS: Thank you, Your Honor.

MR. LEMONS: Your Honor, may we be excused?

THE COURT: Yes. And anyone else who wishes to be excused now may be excused.

MS. MARCUS: Your Honor, the next matter on the

agenda is a pretrial conference, excuse me, in the matter of El Veasta Lampley versus Lehman Brothers Holdings, Inc. and it's going to be handled by my colleague, Zaw Win.

MR. WIN: Good morning, Your Honor, Zaw Win, Weil Gotshal & Manges for Lehman Brothers Holdings, Inc.

As my colleague just mentioned, the next matter is a pretrial conference in Adversary Proceeding No. 13-01354. This matter was commenced by Ms. Lampley on or about May 29th. LBHI filed its motion to dismiss on July 8th, and I think the primary issue before the Court today is to come up with a briefing and hearing schedule for LBHI's motion to dismiss.

We, LBHI, reached out to Ms. Lampley earlier this week to try to come up with a consensual briefing schedule. We didn't get a response from her, although she did send me an e-mail this morning. It was a little bit cryptic, and I'm not sure if she was saying in the e-mail that she was planning to appear by phone for this hearing, or she was not planning to appear.

THE COURT: Let's find out, is Ms. Lampley either on the telephone or in the courtroom or otherwise represented?

(No response)

THE COURT: There's no response.

MR. WIN: The proposal that we made to Ms. Lampley

was that her opposition papers would be due on July 31st by 4 p.m. and then Lehman would file its reply, if any, on August 14th by 4 p.m., and that we could go forward with the motion to dismiss on August 21st. Does that sound like a reasonable solution for the Court?

THE COURT: If it's acceptable to the plaintiff, it's acceptable to me. But you don't know if it's acceptable?

MR. WIN: Exactly our problem, Your Honor.

THE COURT: That's an acceptable schedule, but it would be desirable if it were in fact consensual. To the extent that you are in contact with the plaintiff, it would be desirable to confirm that the proposed schedule is acceptable. If it's acceptable to her, it will be acceptable to me. If it's not acceptable to her, and there are adjustments proposed that are acceptable to Lehman, that will also be acceptable to me.

If it is not acceptable to her, and the proposals made to adjust the schedule are not acceptable to Lehman, we'll probably need to have a further conference to try to resolve the dispute. But what you have suggested on its face sounds reasonable.

MR. WIN: Thank you, Your Honor.

The last matter on today's agenda is a continuation of the debtors' objections to claims filed by Deborah Focht.

As the Court may recall, we previously had a hearing on this matter on April 25th, and at that hearing, the Court agreed to disallow three out of Ms. Focht's five claims. The basis for that disallowance was that those claims were filed late.

And Ms. Focht was given the opportunity to provide additional evidence with respect to her two remaining claims, which are Claim No. 34380, which is filed against BNC Mortgage, and Claim No. 34381, which was filed against Lehman Brothers Holdings, Inc.

Since the April 25th hearing, Ms. Focht has submitted an opposition -- I'm sorry, a second amended response which is listed at ECF No. 38147 and an opposition and motion to strike which was served on the plan administrator on Monday, although I haven't seen it hit the docket yet, so I'm not sure if it's assigned a docket number.

The plan administrator has also filed its response to Ms. Focht's second amended response, which is listed at ECF No. 38138. I think one of the problems the plan administrators had in responding to Ms. Focht's claims is that they're kaleidoscopic in nature. It seems like each time Ms. Focht submits an additional pleading she changes her theory of the claims a little bit. Presumably she's trying to hit on an alignment that's plausible and that would actually support relief on her behalf.

The down side of this activity, of course, is that it's very difficult one, to pen down specifically what she's alleging with respect to these claims, and two, to respond to that. And I think what I'd like to do at this point then is to try to really focus in on specifically what she's alleged with respect to each claim, and then maybe deal with each claim sequentially so that we don't get confused with some of the other issues that have been raised that we certainly would argue are not pertinent.

THE COURT: That's fine. Before we proceed, I just want to confirm that Deborah Focht is, in fact, on the telephone or is in fact present in the courtroom.

MS. FOCHT: I'm on the phone, Your Honor.

THE COURT: Okay. Before we go into the presentation from debtors' counsel, I'd like to reiterate something that I said at the last hearing in April I believe it was, which is, it is virtually impossible for a claimant in the position of Deborah Focht to effectively represent herself on the telephone. I said previously that it was important if you cared about this to be physically present in the courtroom. And I'm simply noting that in appearing by telephone you necessarily are at a disadvantage here.

I can't look at you. I can't judge your credibility. I can't explain things to you with respect to identified exhibits. You are unable to introduce evidence,

and I will make it clear now that everything attached to your pleadings do not constitute evidence.

For that reason, I am at a disadvantage too in being able to effectively evaluate your case. I state that before we go into this, because I viewed the last hearing as unacceptable in terms of the time that was dedicated to it, and the lack of clarity that came out of it, and I'm not going to tolerate that again.

Let's proceed.

MR. WIN: Thank you, Your Honor.

So I'd like to start with Claim No. 34381 which was filed against LBHI in the amount of $1,104,000. On the face of that claim, Ms. Focht lists as her basis "may be actual lender holding insurance or derivative agreements."

Based on that, we focused on Ms. Focht's theory which we understand as being that Ms. Focht believes that LBHI holds insurance policies or derivatives contract that for some reason would trigger a payment to LBHI on the occurrence of Ms. Focht's default under loan.

As an initial matter, we'd just like to point out one, that Ms. Focht has never been able to establish the existence of any of these policies. Two, that there was testimony at the previous hearing, and a declaration submitted by Daniel Gland (ph) from Lehman Brothers suggesting that he had done a search of Lehman's records and

had been unable to locate any relevant policies or contracts. And three, that even if such a contract or policy did exist, Ms. Focht has presented no evidence or no argument even as to why she would have any right to payment in connection therewith.

Ms. Focht apparently attempting to address some of those concerns, Ms. Focht did submit some documents in connection with one of the pleadings that she filed after the April 25th hearing; however, that pleading just included as an attachment two title insurance policies, one of which was not even related to the property, neither of which listed LBHI as the beneficiary, and both of which, based on our review, looked to be title insurance policies. And again, based on our understanding of the way a title policy insurance works, is that it insures defects in title. So for example, it would provide a benefit if some party emerged that had a greater right to the property than the older of the policies, so if someone that had a superior interest in the property records.

They're not based, and they don't provide a benefit in the situation that Ms. Focht is alleging where there has been a default by the borrower. These aren't policies that pay out based on a borrower's default.

So based on that, the debtors would ask the Court to disallow the claim against LBHI based on Ms. Focht's

failure to provide any basis for the claim.

THE COURT: We're just dealing now with one of the two claims.

MR. WIN: That's correct, Your Honor.

THE COURT: Could you just identify that one by number, is that 34380?

MR. WIN: That's correct. Claim 34381 which was filed against LBHI.

THE COURT: 34381 is the claim against LBI -- LBHI?

MR. WIN: LBHI, correct.

THE COURT: Okay. Ms. Focht, what's your response to this?

MS. FOCHT: Yes, I would like to say that I am unable to go to New York, and my understanding was that I was supposed to have a deposition taken from Lehman Brothers, and they opted not to do that. That was my understanding of the last hearing, so I provided an affidavit, which is Exhibit No. 2. That's the best I could come up with trying to follow what your orders were. That's a sworn affidavit.

And then second, I would like to say that I was motion -- requiring a motion as to whether my claims were timely filed. And I had belief at that time that I was receiving an order for that, but that didn't -- the Judge did not order that.

And then third, I am unable to amend my claim because the plan says that we have to get Court authority for that as well. Hello?

THE COURT: I'm going to confess that while you are coming through loud and I can hear your words, I don't understand a word you've said. I don't understand what you're saying.

MS. FOCHT: My understanding was that Lehman was supposed to -- Lehman, the debtors -- I'm sorry, the debtors was supposed to take a deposition in place of my traveling to New York, since I am unable to travel to New York from injuries and due to lack of funds, and that was the first part of what you were mentioning when you started this hearing.

The second was, I was under the impression that according to the hearing, that you wanted me to have a deposition taken from Lehman Brothers, and they opted not to do that. And in place of that deposition is why I filed the affidavit, the sworn affidavit, Exhibit No. 2. At least this is what I felt that you were requesting.

THE COURT: Maybe counsel for Lehman can help act as an interpreter.

MR. WIN: I'll do my best, Your Honor.

I think the first point that she raised was the issue of why LBHI didn't take her deposition in connection

with this matter, and my response to that would be, I mean, in all these claims objections, the debtors have a responsibility to weigh the expense of the litigation against the issues that are really properly raised in the matter, and obviously with an eye towards keeping costs down. So in this situation we did consider taking Ms. Focht's deposition, but we didn't consider at least with respect to the arguments that we've raised to date, all of them are really legal arguments, and we didn't believe that taking Ms. Focht's deposition justified the expense based on the evidence that could be adduced.

I think Ms. Focht's second point is that she did attach what she terms is a declaration to one of her papers, and we wouldn't dispute that. There is a declaration. We don't believe that the declaration contains any information that wasn't already included in her other pleadings, and that we haven't already taken into consideration. But there was a declaration that was produced by Ms. Focht.

Then I guess with respect to the last two points she's made, I'm a little confused. I think she's still talking about the timeliness of the remaining claims. And as we pointed out in our papers, even though those claims technically received by Epiq a day after the bar date, the debtors are not, at least at this point, and don't anticipate challenging the remaining two claims on the basis

that they were late filed. So I think that's really a moot issue.

And then last with respect to her request to amend the claims, she's right that under the plan, parties are required to get approval from the Court in order to amend their claims. And I think at this point, I think there are probably significant legal hurdles to do that, but she hasn't even started that process.

She hasn't filed a motion, she hasn't requested that the Court give her authorization to amend those claims. So I don't think that issue is really before the Court at this point. But she really hasn't addressed the issues that we've just discussed with respect to the LBHI claim. And in the interest of time, I'd really like to focus particularly on that claim at this point and see if we can resolve that before we move on to some of these other issues.

THE COURT: Ms. Focht, as I --

MS. FOCHT: Your Honor, may I just state that --

THE COURT: Just wait one moment. As I stated a little earlier, telephonic participation in this hearing is inadequate. I am not going to continue this hearing today on that basis. I'm going to do the following.

Claims 34380 and 34381 are going to be disallowed unless you are able to appear in person or through competent counsel live in this courtroom at the next scheduled hearing

on claims, and present a cogent, credible and well-supported argument why the claims should not be disallowed.

If you fail to do that, they will be disallowed. Do you understand what I have said?

MS. FOCHT: Yes, Your Honor. I would also like to point out that my other option should be -- a motion for relief from stay in order to resolve this issue, because I have no other way to resolve the issue.

THE COURT: You are making no sense to me. This has nothing to do with a motion for relief from stay. This has to do with objections made to your claims. Your claims are on the verge of being disallowed unless you do something in person in this courtroom. Participating by telephone is not going to be permitted in the future as to you. It doesn't work. You're going to have to show up in person or with competent counsel that you have engaged. Your papers do not make sense to me. I have read them. And unless you can make a credible case, the debtors' request that these claims be disallowed will be granted.

You should obtain a date right now. What's the next scheduled date for claims?

MR. WIN: August 29.

THE COURT: August 29. You'll be on the calendar then. If you're not here, your claims will be disallowed.

MS. FOCHT: What about a transfer over here into

the district and State of Florida?

MR. WIN: I think she's requesting a change of venue to a court in Florida, I didn't catch which one she said.

THE COURT: You have filed a claim in the Lehman Brothers bankruptcy case, which is pending in the Southern District of New York. You have to participate here. And you can't do it by telephone because you are not effectively making yourself clear, both in the things you say over the loud speaker, and in the papers that you have filed.

I am giving you your last chance to respond, but you have to respond in person. That concludes today's hearing.

MR. WIN: Thank you, Your Honor.

MS. MARCUS: Thank you, Your Honor.

(Proceedings concluded at 12:08 PM)

I N D E X

R U L I N G S

C E R T I F I C A T I O N

I, Sheila G. Orms, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: July 18, 2013

Sheila Orms

Digitally signed by Sheila Orms
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